No. 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

SALVATORE BENANTI, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

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INDEX

AUTHORITIES

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OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals (R. 42)[1] was entered on May 6, 1957. A petition for rehearing was denied on June 4, 1957 (R. 48). The petition for a writ of certiorari was filed on June 28, 1957, and granted on October 8, 1957. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

[1] "R" refers to the record filed in connection with the petition for certiorari.

QUESTIONS PRESENTED

Whether evidence obtained through wiretapping by state officials is admissible in a federal criminal prosecution in a United States District Court.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103, 47 U. S. C. § 605, provides:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof,

knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of New York on August 3, 1956 (R. 3). The first count of this indictment charged possession of alcohol without tax stamps affixed and the second count charged transportation of such alcohol, in violation of 26 U. S. C. §§ 5008(b)(1) and 5642.

The facts in this case are not in dispute and are fully set forth in the opinion of the court below. Petitioner and his brother frequented the Reno Bar in New York City (R. 8). The New York City police, believing that the Benantis were violating the state narcotics laws, obtained a warrant authorizing them to tap the telephone of the Reno bar (R. 12).

The police intercepted numerous conversations in which the Benantis were participants (R. 17-18). On May 10, 1956, they intercepted a conversation between petitioner and some other person, during the course of which it was stated that "eleven pieces" would be transported that night at a certain time and place (R. 14). Acting pursuant to this information, the police stopped and searched a car driven by petitioner's

brother. Instead of narcotics they discovered eleven five gallon cans of alcohol without the tax stamps required by federal law (R. 14). They notified the Federal Alcohol and Tobacco Tax Division of the Treasury Department and this prosecution followed.

Concededly all of the evidence introduced against petitioner stemmed from the intercepted conversation. The trial judge denied petitioner's motion to suppress on the ground that no federal officer had participated in the interception, relying upon the case of *Weeks* v. *United States*, 232 U. S. 383, and on the further ground that the action of the state officers was authorized by state law (R. 28). The jury returned a verdict of guilty under both counts and petitioner was sentenced to imprisonment for eighteen months under each count, the sentences to run concurrently (R. 30).

The Court of Appeals said (244 F. 2d at 390) that "The case is important and we think of first impression." It held that New York could not legalize what Congress had prohibited, and hence that the state officers violated § 605 of the Federal Communications Act despite the fact that their action was taken in pursuance of state law. It went on to affirm petitioner's conviction, however, on the ground that evidence obtained by wiretapping is, like evidence obtained by illegal search and seizure, admissible in a federal prosecution as long as no federal officer participated in its illegal acquisition.

SUMMARY OF ARGUMENT

A. The intervention of state officers in an unlawful search and seizure differs completely from the participation of state officers in wiretapping, because of the difference in source and scope of the prohibitions involved.

Evidence obtained as the fruit of an unreasonable search and seizure is inadmissible in a federal prosecution because of the Fourth Amendment. The first eight amendments, it has been repeatedly and consistently held, do not bind the States. And although *Wolf* v. *Colorado*, 338 U. S. 25, did indeed hold that the Fourth Amendment is incorporated into the Fourteenth, *Irvine* v. *California*, 347 U. S. 128, shortly thereafter, demonstrated that the incorporation was not complete.

Here, however, there is no vague or uncertain command. The prohibitions of Section 605 apply to all communications, even those that are purely intrastate, *Weiss* v. *United States*, 308 U. S. 321, and they forbid not only intercepting the message but also divulging its existence, its substance, or its terms.

B. Accordingly, every expression in the books up to now, apart from the ruling now under review, is that the fruits of wiretapping are inadmissible in a federal prosecution in a federal court, and that was also said in *Schwartz* v. *Texas*, 344 U. S. 199, 201, where the contrary was held as to a state prosecution.

C. The search and seizure doctrine, that a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter" (*Lustig* v. *United States*, 338 U. S. 74, 78-79), rests on the Fourth Amendment, and has no application to wiretapping in view of the specific prohibition of Section 605 against divulging the message or its substance. "To recite the contents of the message in testimony before a court is to divulge the message." *Nardone* v. *United States*, 302 U. S. 379, 382. Plainly, therefore, Section 605 applies to federal

court proceedings (*Schwartz* v. *Texas*, 344 U. S. 199, 203). The *status* of the person making the interception is accordingly immaterial.

D. The circumstance that the state officers here purported to act pursuant to a state statute cannot legalize what Congress has prohibited, as the court below properly held. The federal command controls, certainly as to what constitutes admissible evidence in a federal criminal proceeding. Rule 26, F. R. Crim. P.

E. The fact that the federal officers did not know of the tainted source of their evidence until the trial is immaterial. Their *scienter* would only be material if they were charged criminally under 47 U. S. C. § 501, for having participated in a violation of § 605. Here there is no question of punishing officers of the law, but only an issue of admissibility, and the only showing necessary is that divulging the fruits of the wiretapping would have violated § 605.

F. It is not necessary to reach the constitutional question considered in *Olmstead* v. *United States*, 277 U. S. 438, where Holmes, J., denounced as "dirty business" wiretapping by federal officers that involved a violation of state law. The present case rests on a statute, and involves even dirtier business, since by causing the fruits of an interception to be divulged in a federal court room, the federal officers violated federal law. Consequently, the very act of convicting petitioner for a violation of federal law necessarily involved the violation of another federal law.

ARGUMENT

EVIDENCE OBTAINED IN VIOLATION OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT, BY ANY PERSON WHOMSOEVER, IS INADMISSIBLE IN A FEDERAL PROSECUTION IN A FEDERAL COURT.

The heart of the present case is that, by reason of the differing scope of the Fourth Amendment and Section 605 of the Federal Communications Act, the intervention of state officers in an unlawful search and seizure has one effect in a federal criminal prosecution, while their participation in wiretapping has a very different consequence in such a prosecution.

The Government's assertion (Br. Op. 7) that "Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps" blurs the true reasons why the two situations "present distinct legal problems" (Pet. 7).

A. A state officer participating in an illegal search and seizure does not violate federal law, whereas a state officer engaging in wiretapping does.

The basic error of the Government and the court below lies in the assumption that all evidence illegally obtained is to be treated on the same footing. This too facile equation overlooks a vital distinction.

The reason why the issue here, whether evidence illegally obtained because of wiretapping in violation of Communications Act § 605 is admissible in a federal prosecution, differs from the inquiry whether evidence illegally obtained because of an unreasonable search and seizure is there admissible, follows from the difference in source and scope of the prohibitions involved.

Evidence obtained as the fruit of an unreasonable search and seizure is—subject to a qualification fully discussed below—inadmissible in a federal prosecution

because of the Fourth Amendment's protection against unreasonable searches and seizures. *Weeks* v. *United States*, 232 U. S. 383. That Amendment by its own force limits all federal action. But the first eight Amendments, which were adopted to curb the powers of the newly created Federal Government, and whose adoption was indeed the price exacted for ratification of the Constitution, do not bind the States; that proposition was first established in *Barron* v. *Baltimore*, 7 Pet. 243, in an opinion written by Chief Justice Marshall, who had himself been a participant in the ratifying process as a member of the Virginia Convention. See 1 Beveridge, *The Life of John Marshall*, 364-480.

Repeated attempts to make the provisions of those amendments bind the States, on the theory that the first eight amendments were included in their entirety within the Fourteenth Amendment, have been consistently rejected by this Court. *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319. The last rejection, where the issue was extensively explored, took place only ten years ago. *Adamson* v. *California*, 332 U. S. 46.

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."

But the *Wolf* case did not purport to overrule the settled line of cases, from *Barron* v. *Baltimore* through *Adamson* v. *California*, or the principle that the first

eight amendments did not limit the States *ex proprio vigore*. To the contrary, the Court said (338 U. S. at 26), "The issue is closed", and it affirmed a state conviction that rested upon evidence obtained by an illegal search.

Three propositions necesarily follow from *Wolf*.

First, the state officers who participated in the illegal search that turned up the evidence on which Wolf was convicted did not violate any federal law, using "law" in its broadest sense.

Second, the Fourth Amendment does not bind the States.

Third, the Fourth Amendment is not fully incorporated in the Fourteenth.

The proof of the third proposition came shortly thereafter, in *Irvine* v. *California*, 347 U. S. 128. There the Court affirmed a state conviction that rested in large measure on the defendant's incriminating statements, which had been obtained by state police officers who had surreptitiously entered defendant's home, and placed a microphone in a bedroom and a closet.

It could hardly be contended that a federal conviction thus tainted would have passed constitutional scrutiny. *Cf. Kremen* v. *United States*, 353 U. S. 346; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451. Plainly, therefore, the Fourteenth Amendment's protection against unreasonable searches and seizures on the part of state officers is markedly narrower than the Fourth Amendment's protection against similar conduct by federal officers.

In the present case, however, the situation is wholly different. Here there is involved no vague federal

command, the meaning of which is unclear—or at least not accurately predictable—and whose eventual scope can only become settled through the gradual process of inclusion or exclusion.

The federal command in the case at bar is found in a statute of general application, which applies to all communications, even those that are purely intrastate. *Weiss* v. *United States*, 308 U. S. 321. The scope of that statute leaves no room for interpretation, and this Court has accordingly held that when Congress in Sec. 605 said that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person", it meant that "no person" should divulge an intercepted communication to "any person". *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338. And it is significant that, although repeated attempts have been made over the years to legalize wiretapping, even in a narrow class of cases and under careful safeguards, Congress has steadfastly refused to amend Section 605 in any way.[2]

Consequently, the question is not, as the court below and the Government here assume, whether all kinds of

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[2] Extensive citations to unsuccessful proposals to amend § 605 will be found in Brownell [Atty. Gen. of U. S.], *The Public Security and Wire Tapping*, 39 Corn. L. Q. 195; Rogers [Dep. Atty. Gen. of U. S.], *The Case for Wire Tapping*, 63 Yale L. J. 792; Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. of Pa. L. Rev. 157; Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165. For proposals subsequent to the date of the latest of the foregoing articles, see Wiretapping, Hearings before Subcommittee No. 5, House Judiciary Committee, on H. R. 762 and related bills, 84th Cong., 1st sess.

evidence illegally obtained stand on the same footing with respect to admissibility in a federal criminal prosecution. Nor is the question whether, as an original proposition, a violation of a statute is to be more sweepingly condemned than a violation of the Constitution. *Cf.* L. Hand, J., in *United States* v. *Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114. Such generalized abstractions do not assist in the solution of the present very specific case. The question here is whether Section 605 has a more comprehensive reach by reason of its explicit terms than either the constitutional provisions contained in the Fourth Amendment, which has only a limited scope, or those contained in the Fourteenth Amendment, whose scope in this field is still uncertain.

In view of *Wolf* and *Irvine*, it cannot be said that every illegal search by a state officer offends against federal law. But the terms of Section 605 make it clear that every wiretapping by a state officer does. Accordingly, as we now will show, every expression in the books up to now is contrary to the holding under review.

B. Wiretapped evidence obtained by state officers and turned over to federal officers for use in a federal prosecution is inadmissible in a federal court.

We are dealing here with a federal prosecution in a federal court,[3] where the prohibition in question is that of the same sovereign who is prosecuting. Consequent-

[3] A different rule might perhaps follow in a state prosecution removed into a federal court under 28 U. S. C. §§ 1442, 1442a. *See Tennessee* v. *Davis*, 100 U. S. 257; *Carter* v. *Tennessee*, 18 F. 2d 850 (C. A. 6); *Miller* v. *Kentucky*, 40 F. 2d 820 (C. A. 6); *Maryland* v. *Chapman*, 191 F. Supp. 335 (D. Md.). But this is not such a case.

ly, the recent holding here, that telephone conversations intercepted by state officers were admissible in a state prosecution (*Schwartz* v. *Texas*, 344 U. S. 199), is not apposite.

Quite to the contrary, the Court in *Schwartz* was at pains to note (344 U. S. at 201) that "the intercepted calls would be inadmissible in a federal court."

Earlier, in *Upshaw* v. *United States*, 335 U. S. 410, 414, 427, four Justices had said.

> "The prohibition of wiretapping in § 605 of the Federal Communications Act, 47 U. S. C. § 605, is not the basis for the exclusion in prosecutions of evidence so obtained. The exclusion of such evidence is based on an explicit direction of the section that information so obtained should not be divulged."

Two Courts of Appeals have assumed and necessarily decided, contrary to the court below, that an undoubted interception by state officers alone would be inadmissible in a federal prosecution. *Rathbun* v. *United States*, 236 F. 2d 514 (C. A. 10), pending on writ of certiorari, No. 30, this Term; *United States* v. *White*, 228 F. 2d 832 (C. A. 7); *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7).

In those three cases, true enough, the precise issue was whether listening in on an extension telephone constituted a violation of Section 605. Plainly, if an undoubted interception by state officers is admissible in a federal prosecution, as the court below held here, then it would not have been necessary to inquire whether the conduct involved in *Rathbun*, *White*, and *Bookie* amounted to an interception. Each of those cases could then have been disposed of on the assump-

tion that it did, and thus the troublesome issue of the precise limits of a forbidden interception could have been avoided. Compare *Goldman* v. *United States*, 316 U. S. 129 (detectaphone); *On Lee* v. *United States*, 343 U. S. 747 (walkie-talkie); *Sugden* v. *United States*, 226 F. 2d 281 (C. A. 9), affirmed *per curiam*, 351 U. S. 916 (FCC monitoring). The Tenth and Seventh Circuits thus necessarily decided the question involved in the present case, and decided it differently than did the court below.

Finally, in *DeVasto* v. *Hoyt*, 101 F. Supp. 908 (S. D. N. Y.), a three-judge district court, although refusing the plaintiffs—defendants in a state prosecution—an injunction against the use in that prosecution of telephone conversations intercepted by state officials, said (p. 909), "It is undisputed that this evidence would be inadmissible in a federal criminal prosecution."

The foregoing impressive listing of authority—unanimous except for the holding now under review—is fully supported by a consideration of the statute's purpose. Congress has said that intercepted telephone conversations shall not be divulged to "any person". By what process of reasoning, then, does it become proper to disclose them to federal jurors in a United States court? Where the statute is thus plain, it should not be necessary to go further and to urge in addition the principle that enforcement of federal law in a federal court shall not rest on the fruits of a disobedience of federal law.

C. The terms of Section 605 of the Federal Communications Act render inapplicable the "silver platter" doctrine.

The Government argued (Br. Op. 8-9) that, since the interception in the present case was made by state officers under state law, the rule applicable is that of *Lustig* v. *United States*, 338 U. S. 74, 78-79, namely, that "a search is a search by a Federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

But that is the search and seizure rule, the basis of which, see *Byars* v. *United States*, 273 U. S. 28, 33-34, was that the Fourth Amendment does not apply to state officers, at least until they are enforcing federal law, in which event they are to be treated as federal officers. *Gambino* v. *United States*, 275 U. S. 310. (In the converse situation, however, where federal officers assist in enforcing state law, they are still under the restrictions attaching to their federal status; see *Rea* v. *United States*, 350 U. S. 214, where federal officers were enjoined from using, by becoming witnesses in a subsequent state prosecution, evidence illegally obtained by them in their federal status. Thus the area for the legal use of illegally obtained evidence is—very properly—becoming ever smaller.)

In the present case, however, the applicable prohibition is broader. Section 605 is specific where the Fourth Amendment—and, *a fortiori*, the Fourteenth—are only inferential. Not only is interception of messages prohibited by § 605, that provision likewise forbids divulging what has been intercepted. Thus, for purposes of a federal trial, it makes no difference by whom or under what circumstances the original interception took place.

This Court in the first *Nardone* case answered the question presently in issue (302 U. S. at 382):

> "We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "*no person*" shall divulge or publish the message or its substance to "*any person.*" To recite the contents of the message in testimony before a court is to divulge the message. * * *" (Italics in original.)

The underlying principle of § 605 was further elaborated in the second *Nardone* case (308 U. S. at 340-341):

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone v. United States* (302 U. S. 379), *supra*. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in

> a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See *Gouled* v. *United States*, 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."

The nub of the present issue is that, as said in the first *Nardone* case, "To recite the contents of the message in testimony before a court is to divulge the message."

So far as proceedings in federal courts are concerned, that consideration is decisive, and *Schwartz* v. *Texas*, 344 U. S. 199, far from being to the contrary, actually supports the proposition. For as was there said (344 U. S. at 203),

> "We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

Section 605 is simply too broad—and too explicit—to permit divulging, in any federal prosecution in a federal court, "the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *." In the face of this language, the *status* of the person making the interception is, obviously, entirely irrelevant to the prohibited divulging of what was intercepted.

D. The circumstance that the state officers here purported to act pursuant to a state statute cannot legalize what Congress has prohibited.

The Government argued (Br. Op. 9-10) that, since "the interception was done pursuant to a state warrant issued by authority of state law, with the kind of protection afforded by search warrants, * * * the evidence thus obtained should not be excluded by a federal court."

This argument was flatly rejected by the court below (244 F. 2d at 391):

> "Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. Nardone v. United States, 302 U. S. 379; Id., 308 U. S. 338; Weiss v. United States, 308 U. S. 321. Section 605 of 47 U. S. C. A. is too explicit to warrant any other inference, and the Weiss case made its terms applicable to intrastate communications."

Indeed, the Government's contentions based on state law lack even the doubtful merit of atmospheric trimming. It is not necessary here to determine whether Congress has occupied the field, so as to preclude the operation of state legislation not inconsistent with the Congressional enactment. *Cf. Pennsylvania* v. *Nelson*, 350 U. S. 497. Here the two provisions are squarely inconsistent; the federal statute—which applies to intrastate messages, *Weiss v. United States*, 308 U. S. 321—prohibits all interceptions, the state statute purports to legalize some of them. In those circumstances, plainly, the federal rule prevails. *E.g., Hill* v. *Florida*,

325 U. S. 538. It could not be otherwise, consistently with the Supremacy Clause. U. S. Const., Art. VI. And, whatever may be the rule in civil cases in the federal courts, see F. R. Civ. P., Rule 43(a), it is plain that state law is ineffective to vary rules of evidence that Congress has prescribed for the trial of federal criminal cases. F. R. Crim. P., Rule 26. That the Government should seriously suggest that state law can immunize the federal crime (47 U. S. C. § 501) on whose fruits the present conviction rests verges, we submit, on the amazing.

E. The circumstance that the federal officers did not know of the tainted source of their evidence until the trial is immaterial.

The Government argues (Br. Op. 9, n. 1), that in this case the federal officers did not knowingly offer evidence discovered as a result of the wiretap, quoting from the opinion below (244 F. 2d at 390):

> "It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wire."[4]

But the Government's argument is patently unsound, essentially because it assumes that the admissibility of the evidence now in question depends in any degree upon the *scienter* of those who offer it. No such concept has validity here. Guilty knowledge is mate-

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[4] The sentence next following, not quoted by the Government, is as follows:

> "But it is equally clear that but for the wiretap there would have been no basis for any prosecution whatever, as the apprehension of Angelo and seizure of the 'eleven pieces' led to the discovery of appellant's participation in the violations of federal law for which he has been convicted; and the sequence of cause and effect is clear."

rial only in criminal cases, where the punishment of the actor is in issue. If the federal officers who prosecuted the present case had been charged with a violation of 47 U. S. C. § 501, then the circumstance that he had not "knowingly offered any evidence which was discovered as a result of the wiretap" (244 F. 2d at 390) would be material, relevant, and perhaps determinative. But the question here is very different. It is not whether the federal officers are to be punished for having made use of the evidence obtained through the use of wiretaps, but rather whether such evidence is admissible at all. The basis for excluding any kind of illegally obtained evidence is not punishment of the offender but the vindication of a public policy. *Cf.* Reed, J., in *Upshaw* v. *United States,* 335 U. S. at 418-422. In the case of evidence obtained by tapping telephone conversations, such inadmissibility rests on 47 U. S. C. § 605, while punishment for having made the interception is prescribed by 47 U. S. C. § 501. Consequently here, where admissibility alone is in issue, it makes not a particle of difference whether the federal officers knew or were ignorant of the source of the illegal evidence that they used.

The analogy here is that of evidence tainted by perjury, and the controlling precedent comes from the last Term. *Mesarosh* v. *United States,* 352 U. S. 1. There a conviction was set aside because evidence duly adduced by the prosecution at the trial, without knowledge of its falsehood, was later found to be untrue. This Court rejected the Government's request that the case be remanded for an ascertainment of the impact of the false testimony; it reversed, holding that no conviction based on such tainted evidence could be permitted to stand.

Surely there can be no difference between a conviction tainted by untruthful testimony, not known to be such when offered by the Government but involving perjury in violation of 28 U. S. C. § 1621, and a conviction tainted with testimony obtained by means which violate 47 U. S. C. § 501, not known to have been such when offered by the Government.

The question is therefore not whether the Government knew of the taint when the evidence was first adduced; it is whether at the trial there was a showing that to divulge that testimony would have run counter to the command of § 605 and would have involved a violation of the offence denounced by § 501. No further showing is necessary.

F. Federal law should not be enforced by violating federal law.

When, nearly a generation ago, this Court sustained a federal conviction resting on wiretapped evidence obtained in violation of state law, Mr. Justice Holmes characterized the proceeding as "dirty business." *Olmstead* v. *United States,* 277 U. S. 438, 469, 470. The rule of that case, that wiretapping does not violate the Fourth Amendment's prohibition against searches and seizures, still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States,* 316 U. S. 129, 136; *On Lee* v. *United States,* 343 U. S. 747, 758, 762. Nor is there any present reason again to reach the constitutional issue; the case at bar can be disposed of under the statute.

Mr. Justice Holmes was "not prepared to say that the penumbra of the 4th and 5th Amendments covers the defendant." 277 U. S. at 469. His comment about

"such dirty business" was evoked by the circumstance that what the federal officers did in *Olmstead* involved the commission of a crime under state law, and so he concluded (277 U. S. at 471) that "if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."

If we start from Mr. Justice Holmes' premise that a violation of state law by federal officers is "dirty business", then the present case is, in two respects, even dirtier business.

First, taking §§ 501 and 605 of 47 U. S. C. together, it is plain that, by causing the existence, the substance, and the fruits of the intercepted message to be divulged in the courtroom, the federal officers concerned violated not state but federal law. They have caused to be violated (*cf.* 18 U. S. C. §§ 2, 3) the law of the very government from which they derive their authority.

Second, whereas the admission into evidence at the *Olmstead* trial of the information obtained by committing a violation of state law did not involve a further violation of that law, in the present case the divulging of the wiretapped evidence in the courtroom violated the express prohibition of § 605 and may well have violated § 501 as well, certainly after the tainted source became apparent. In the present case, therefore, the very act of convicting petitioner for a violation of federal law necessarily involved the violation of another federal law.

CONCLUSION

Enforcement of federal law in a federal court may not rest on the fruits of a violation of federal law. The judgment of the court below should therefore be reversed.

Respectfully submitted,

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